82-232

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AUG 6 1982
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1982

NO. _____

DEL RIO FLYING SERVICES, INC.
a corporation

Petitioner.

versus

MA DEL CARMEN ~~DBE~~ B. de MANJE, surviving spouse of Robert S. Manje, Jr. deceased; et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HAROLD D. PUTMAN
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August 8, 1982

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IN THE
SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1982

NO.

DEL RIO FLYING SERVICES, INC.
a corporation

Petitioner.

versus

MA DEL CARMEN DBE, surviving
spouse of Robert S. Manje, Jr.
deceased, et al.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Del Rio Flying Service, Inc., a corporation, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court for the Ninth Circuit entered in this proceeding on June 22, 1982.

QUESTIONS PRESENTED

I.

Whether the presumption of due care on the part of the deceased employees is overcome by the inference of negligence flowing from the Doctrine of Ipsa Loquitur.

II.

Whether the invocation of the Doctrine of Res Ipsa Loquitur dispenses with the determination of negligence and proximate cause thereby shifting the burden of proof to the defendant on these issues.

III.

Whether in the absence of definitive state law in Arizona, the District Court was not incorrect in applying the Doctrine of Res Ipsa Loquitur to account for the crashing of the airplane.

LIST OF ALL PARTIES

PETITIONER: Del Rio Flying Services, Inc.

RESPONDENTS: MA Del Carmen DBE Manje, Sr.
Robert S. Manje, Sr.
Celina Manje

DESIGNATION OF CORPORATE RELATIONSHIPS

Del Rio Flying Service, Inc. filing this Petition for Writ of Certiorari states that:

This is the Original Designation of corporation relationships.

The Del Rio Flying Service, Inc. is not owned by any parent corporation.

The Del Rio Flying Service, Inc. does not have any ownership interest in any subsidiaries.

The Del Rio Flying Service, Inc. does not have any affiliates.

Dated: August 1, 1982.

OPINION BELOW

The Opinion of the Court of Appeals is as yet unreported, but is reproduced in the Appendix 1. The Opinion of the District Court for the District of Arizona and pertinent Orders, likewise, are unreported, but are reproduced in the Appendix Nos. 2, 3, 4.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered June 22, 1982, affirming the Judgment of the Trial Court entered March 23, 1981. No petition for Rehearing was filed, but this Petition for Writ of Certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. S1254(1). Jurisdiction of the United States District Court attached by reason of the diversity of citizenship, the plaintiffs being residents of the State of Arizona and the Defendant a resident of the State of Texas, and the amount in controversy exceeding $10,000.00. 28 U.S.C. S1332.

STATEMENT OF THE CASE

On September 10, 1978, Doyle T. Smith, a pilot employed by Del Rio Flying Service, Inc., was flying a Cessna 172N, registered number N 793 RM, pursuant to a contract between Del Rio Flying Service, Inc. and the United States Department of Agriculture. The contract provided that Del Rio Flying Service, Inc. would supply planes and pilots for hire to the United States Department of Agriculture.

Del Rio Flying Service, Inc. owned the Cessna 172N and provided the plane and pilot to the Department of Agriculture for the purpose of flying Robert Manje, an employee of the Department, over the State of Arizona to disburse sterile screw worms. The airplane was a relatively new aircraft with only 554.5 hours. It had nor had enough time to have an annual inspection, and the last 100 hours inspection had been performed within 52.5 hours of the

time of the accident.

On September 11, 1978, the airplane was found crashed into the side of the a steep canyon approximately three miles northeast of Bisbee, Arizona.

Both the pilot and Robert S. Manje, Jr. were found dead at the scene of the crash. The pilot, who was the only individual in the airplane with a pilot's license, was found in the left seat which was the normal position to fly the aircraft.

An accident investigation was subsequently performed by the National Transportation Safety Board and revealed that at the time of the takeoff, the plane was not overloaded, the visibility was unrestricted for 30 miles, and there was no reported turbulence. There was no evidence of pretakeoff or pre-impact malfunction or failure. The investigation also disclosed that the pilot, Doyle T. Smith, was currently certified, had a current medical exam and was rated as an airline commercial pilot with flight instructor, multi-engine, single engine, land and instrument ratings. Finally, the engine of the plane was subject to a tear down inspection which showed no mechanical defects.

Pathological studies revealed that neither the pilot, Doyle T. Smith, nor Mr. Manje, Jr. had any barbituates, alcohol or carbon monoxide poisoning. Moreover, there was no evidence of any pre-impact factors such as heart attack or other similar problems that might have detracted from the pilot's physical ability to operate the aircraft.

In sum, the medical and accident investigations of the crash revealed no cause as to the accident.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The decisions of the Trial Court and the Court of Appeals in the instant case are in conflict with the decision of

this Court in **Sweeney v. Erving,** 33 Sup. Ct. 416; 223 U.S. 233.

Likewise, they are in conflict with th holdings of the Court of Appeals, Tenth Circuit, in **Stevens v. Barnard,** 512 F. 2d, and of the Court of Appeals, Fifth Circuit, in **Morrison v. Le Tourneau,** 138 F. 2d 339 and **Chapman v. U.S.,** 194 F. 2d 974.

The Sweeney case aforesaid set out the placement of the burden of proof which was ignored in the instant case.

The holdings of the Tenth Circuit in **Stevens v. Barnard,** 512 F. 2d 876, and Fifth Circuit in **Chapman v. U.S.,** 194 F. 2d 974 and **Morrison v. Le Tourneau,** 138 F. 2d 339 are in conflict with the holdings of the Trial Court of Appeals for the Ninth Circuit in that both of those Circuits refused to find negligence and causation on the part of the pilot in the absence of any evidence thereof. They refused to permit the Doctrine of Res Ipsa Loquitur to shift the burden of proof as was done in the instant case.

In 1913 this Honorable Court in **Sweeney v. Erving,** 33 Sup.Ct. 416; 223 U.S. 233, stated the law on the applicability of Res Ipsa Loquitur and the burden of proof remaining with the Plaintiff as follows:

> "In our opinion, res ipsa loquitur means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where directed evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.

. . .

> The law attaches no special weight as proof to the fact of an accident, but simply holds it to be sufficient for the consideration of the jury, even n the absence of any additional evidence."

This basic law has been continuously cited and followed by this Court in **Johnson v. U. S.**, 68 Sup. Ct. 391, and **Commercial Molasses Corp. v. New York Tank Barge**, 314 U. S. 156.

As to the presumption of due care on the part of the deceased, the Court of Appeals, Ninth Circuit, completely ignored the issue although it is universally recognized law. Corpus Juris Sec., 25a S80(2) 824.

All branches of aviation deserve to have the questions presented in the instant case settled — one way or the other. The resolution of the questions are vitally important in the ever-increasing amount of litigation flowing from nearly all crashes, whether a pilot and one passenger are involved, or a pilot and 131 passengers. Should the invocation of the magic Doctrine of Res Ipsa Loquitur shift the burden of proof on the issues of negligence and proximately cause? Does the inference of negligence of Res Ipsa Loquitur become a presumption? Does the presumption of due care of deceased yield and submit to an inference or even a presumption, thus shifting the burden of proof? Are there varying degrees of presumption in the law and varying weights to be given them?

The are vital issues of greatest import and only the required answers can help dam the fload of litigation certain to follow present and future crashes. The aviation carriers and operators are not insurers, and plaintiffs should continue to be required to discharge the burden of proof of establishing negligence and causation.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this Petition for Writ of Certiorari should be

granted.

Respectfully submitted,

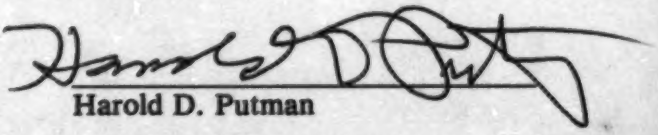
HAROLD D. PUTMAN
Attorney for Petitioner
Texas State Bar #16412000
San Antonio, Texas 78205
Telephone: (512) 226-0221

CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Petition for Writ of Certiorari have been mailed to

Mr. Richard D. Grand
800 Transamerica Building
Tuscon, Arizona 85701

Attorney of record for Respondents.



Harold D. Putman

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MA DEL CARMEN DBE MANJE, surviving spouse of Robert S. Manje, Jr., deceased, et al.,

Plaintiffs-Appellees,

vs.

RODNEY ROBERTSON, et ux,

Defendants,

and

DEL RIO FLYING SERVICES, INC., a corporation,

Defendant-Appellant.

No. 81-5302

D.C. No. 79-20 TUC (RMB)

MEMORANDUM

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, District Judge, Presiding
Argued and Submitted May 4, 1982

Before: BROWNING, Chief Judge, TANG and FARRIS, Circuit Judges

For the reasons the district court stated, the court's decision to apply res ipsa loquitur was not "clearly wrong." **Gaines v. Haughton**, 645 F.2d 761, 770 (9th Cir. 1981).

The parties argued the question of discount and inflation rates before the district court as a question of

fact. Appellant did not object to the court deciding the question on the basis of the evidence before it. The record shows that the court found the two rates to be approximately equal, and did not arbitrarily set off one against the other.

AFFIRMED.

APPENDIX II

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ARIZONA

Civil Action File No. 79-20 TUC RMB

MA DEL CARMEN
BDE MANJE, et al
Plaintiffs,

vs. JUDGMENT

RODNEY ROBERTSON
et ux, et al

Defendants

This action came on for trial before the Court, Honorable RICHARD M. BILBY, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged That Judgment is entered in favor of plaintiff, MA DEL CARMEN DBE MANJE as the surviving spouse of decedent Robert S. Manje, Jr. and against the defendant DELRIO FLYING SERVICES, INC., a corporation, in the amount of $275,617.60, which amount shall be distributed by the plaintiff as follows: (1) To plaintiff Ma Del Carmen Manje, $235,617.60. (2) To Robert S. Manje, Sr., $17,296.00. (3) To Celina Manje, $22,704.00; together with plaintiffs' costs incurred herein.

Dated at Tucson, Arizona , this 23rd day of March , 1981.

W. J. FURSTENAU, CLERK

By: _____
Deputy Clerk of Court

APPENDIX III

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MA DEL CARMEN DBE MANJE, surviving spouse of ROBERT S. MANJE, JR., deceased, et al.,

Plaintiffs,

vs.

RODNEY ROBERTSON, et ux, et al.,

Defendants.

No. CIV 79-020-TUC-RMB

ORDER

This case involves a suit for wrongful death by the heirs of a passenger in an airplane owned by the defendant DEL RIO FLYING SERVICES, INC. The matter is presently before the Court on the plaintiffs' motion for Summary Judgment.

The undisputed facts are:

1. On September 10, 1978, defendant DEL RIO FLYING SERVICES, INC. was the owner of a Cessna 172N, Registration No. N739RM. (Hereinafter referred to as the "airplane.")

2. The airplane was a relatively new aircraft with 554.5 hours.

3. The airplane had not had enough time to have an annual inspection and the last 100 hour inspection had been performed within 52.5 hours of the time of the accident.

4. On the date of the accident, Doyle T. Smith was employed by DEL RIO FLYING SERVICES, INC. as a pilot and was flying the airplane pursuant to a contract between DEL RIO FLYING SERVICES, INC. and the United States Department of Agriculture whereby DEL RIO FLYING SERVICES, INC. provided planes and pilots for hire to the United States Department of Agriculture.

5. The right passenger seat of the airplane was positioned so that the passenger would face to the rear of the airplane.

6. Doyle T. Smith was the pilot of the airplane when it took off from the Bisbee-Douglas Airport on September 10, 1978, at 6:01 A.M. MST. The flight plan for the airplane was to go out and fly grid lines in a north/south course three and one-half miles east of the accident site.

7. The airplane was not equipped with dual controls.

8. At the time of take off there was unrestricted visibility of 30 miles and no turbulence was reported, and the airborne pilot reports for the morning hours in the accident area reported no turbulence.

9. At the time of takeoff the airplane was not overloaded.

10. The pilot Doyle T. Smith was currently certified, had a current medical exam and was rated as an airline commercial pilot with flight instructor, multi-engine, single engine, land and instrument ratings.

11. On September 11, 1978, the airplane was found crashed into the side of a steep canyon approximately three miles northeast of Bisbee, Arizona, and three and one-half miles west of the north/south course listed on the flight plan; this point was two miles south of the home of the father of the passenger in the airplane. Both the pilot and the plaintiffs' decedent were found dead at the scene of the crash. The pilot who was the only individual in the airplane with a pilot's license, was found in the left seat

which was the normal position to fly the aircraft.

12. The plaintiffs' decedent did not possess a pilot's license.

13. Medical and accident investigations after the accident established the following:

a) Pathological studies revealed that neither the pilot Doyle T. Smith nor plaintiffs' decedent, Robert S. Manje, Jr. had any barbituates, alcohol or carbon monoxide poisoning;

b) There was no evidence of any pre-impact factors such as heart attack or things of that nature that might have detracted from the pilot's physical ability to operate the aircraft.

14. There was no evidence of pre-takeoff or pre-impact malfunction or failure.

15. On September 23, 1978, the airplane's engine was subjected to a tear down inspection in El Paso, Texas, which showed no mechanical defects.

Plaintiffs' sole basis for their motion, and in fact, their sole basis for their claim of negligence is that of res ipsa loquitur. Defendant claims the motion should be denied for two reasons:

1. Res ipsa loquitur is not applicable to the facts of this accident; and

2. There is a genuine dispute as to the pilot's scope of employment at the time of the accident.

RES IPSA LOQUITUR

Under Arizona law four conditions must be shown in order for res ipsa loquitur to be applied:

(1) the accident must be of a kind which ordinarily does not occur in the absence of some one's negligence;

(2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;

(3) it must not have been due to any voluntary action on the part of the plaintiff;

(4) plaintiff must not be in a position to show the particular circumstances which caused the offending agency or instrumentality to opeate to his injury.

Jackson v. H.H. Robertson Co., Inc., 118 Ariz. 23, 31-32, 574 P.2d 822, 825 (1978) (en banc).

Likewise, the Arizona courts have repeatedly held that the doctrine cannot be invoked where the cause of the accident is wholly a matter of conjucture and speculation. **Stewart v. Crystal Coca-Cola Bottling Co.**, 50 Ariz. 60, 68 P.2d 952 (1937). There, the court held:

> It is only where the existence of negligence is a more reasonable deduction from the facts shown that a plantiff is permitted to call this rule to his aid. It "should not be allowed to prevail where, on proof of the occurrence, without more, the matter still rests on conjucture alone."

Id. at 69, 68 P.2d at 956.

It is clear to the Court that there could only be four rational explanations for this accident. They are:

1. negligence of the pilot;
2. weather problems;
3. mechanical failure in the airplane;
4. some act of the plaintiffs' decedent with the airplane.

The facts clearly negate any failure of equipment, any weather disturbances, or any actions by plaintiffs' decedent. Counsel for the defendants attempted to raise the spector of undrafts such as those that come out of the Grand Canyon; however, he could point to no evidence in the record to substantiate such a claim, and to the contrary, Ms. Funk's deposition at page 33, reveals that not only was there no turbulence in the area of takeoff, there was none reported in the morning hours by other pilots in the accident area.

Under these circumstances, there is only one explanation for the accident and that is pilot error. While Arizona has not had a case factually on point, there are two reported cases of recent vintage which deal with this problem. **Stevens v. Barnard**, 512 F.2d 876 (10th Cir. 1975) interpreting Oklahoma law; and **Newing v. Chratham**, 540 P.2d 33 (Calif. 1975).

The **Stevens** case involved an independent test pilot's crash of an airplane owned by the defendant in that case. The District Court, which was affirmed on appeal, in interpreting Oklahoma law, held that the plaintiff:

> having failed to establish the particular cause of the accident, could not rely upon the benefit of the res'ipsa loquitur doctrine.

512 F.2d at 880.

In **Newing** the California court came to the opposite result on a factual sitution more closely akin to this case than was **Stevens**. The **Newing** court held:

> It is settled law in this state that the "doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible."

540 P.2d at 38-39. The court went on to hold:

> It need not be concluded that negligence is the only explanation of the accident, but merely the most probable one. We deal here in probabilities, not certainties.

540 P.2d at 39 (citations omitted)

While the Supreme Court of Arizona has not ruled on this specific factual case, it is this Court's opinion that if faced with such a case, it would follow the law of California rather than Oklahoma. **See Bailey v. Montgomery Ward & Co.**, 6 Ariz. App. 213, 431, P.2d 108 (1967).

SCOPE OF EMPLOYMENT

Defendant claims that the pilot was not within the scope of his employment at the time of the accident because the crash occurred three and one-half miles from the designated grid line on the north/south course of the flight plan and that the crash took place two miles south of the home of the father of the plantiffs' decedent. To support this theory, they have attached the affidavit of the defendant RODNEY ROBERTSON stating that the pilot Doyle T. Smith did not have permission at any time to fly the airplane outside the north/south course mandated by the flight plan, nor in the area of the crash. Arizona, in following the Restatement (Second) Torts, holds that a servant is acting within the scope of his employment if:

> (a) it is of the kind he is employed to perform;
>
> (b) it occurs substantially within the authorized time and space limits;
>
> (c) it is actuated, at least in part, by a purpose to serve the master . . . .

Olson v. Staggs-Bilt Homes, Inc., 23 Ariz. App. 574, 576, 534 P.2d 1073, 1075 (1975); **Transamerica Insurance Co. v. Valley National Bank**, 11 Ariz. App. 121, 462 P.2d 814 (1969).

The courts have further held that:

> Where an employee is doing what he is supposed to do, the fact that he does it in a manner other than as expected is immaterial, and the employer remains liable for the employee's acts and conduct.

MacNeil v. Perkins, 84 Ariz. 74, 86, 324 P.2d 211, 219 (1958)

The Arizona courts have also held the person driving a vehicle is presumed to be acting on behalf of his employer. **Grain Dealers Mutual Ins. Co. v. James**, 114 Ariz. 116, 575 P.2d 315, 317 (1978).

The fact that an airplane, which flies 200 miles an hour, is found crashed three and one-half miles off its

course and within two miles of the ranch of the passenger's father, does not legally constitute a deviation from the scope of employment or detract from the presumption that the pilot was acting withing the scope of his employment.

At the time of the oral argument, counsel for the defendants also claimed that the passenger was somehow in control or command of the plane. This assertion is not sustainable in light of the Federal Regulations holding:

> The pilot in command of an aircraft is directly responsible for, and is the final authority, as to the operation of that aircraft.

14 C.F.R. S 913(a).

There is no genuine issue of material fact and as a matter of law, the Court finds the pilot was within the scope of his employment at the time of the accident.

IT IS ORDERED that the plaintiffs' Motion for Partial Summary Judgment on the question of liability is GRANTED against the defendant DEL RIO FLYING SERVICES, INC., a corporation.

IT IS FURHTER ORDERED that counsel meet and confer in accordance with Local Rule 42 A and C and file a proposed pretrial order with the Court no later than November 14, 1980. If said proposed order meets with the approval of the Court, a pretrial conference shall be held on Monday, November 24, 1980, at the hour of 4:00 P.M.

The Clerk of the Court is directed to mail copies of this Order to all counsel of record.

DATED: October 27, 1980.

RICHARD M. BILBY
UNITED STATES
DISTRICT JUDGE

APPENDIX IV

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MA DEL CARMEN DBE MANJE, surviving spouse of ROBERT S. MANJE, JR., deceased, et al,.

Plaintiffs,

vs.

No. CIV 79-020-TU-RMB

RODNEY ROBERTSON, et uz., individually and as husband and wife and doing business as DEL RIO FLYING SERVICE, INC., a corporation,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Defendants,

The Court by its Order entered October 27, 1980, granted plaintiffs' motion for summary judgment on the question of liability and reserved the question of damages for trial. After trial before the Court, the following Findings of Fact and Conclusions of Law are entered:

FINDINGS OF FACT

1. The plaintiff Ma Del Carmen Manje, the surviving spouse of Robert S. Manje, Jr., is a citizen of the United States of America, living in the State of Arizona. The plaintiffs Robert S. Manje, Sr. and Celina Manje are citizens of the State of Arizona and the defendants are citizens of the State of Texas.

2. The deceased Robert S. Manje, Jr. was born on May 31, 1943, and died on September 10, 1978.

3. At the time of his death, the decedent was survived by his wife, Ma Del Carmen Manje, born January 30, 1946; his father Robert S. Manje, Sr., born July 24, 1920; and his mother, Celina Manje, born November 30, 1922.

4. At the time of his death, the decedent was in good general health and physical condition as was his wife. His mother who had suffered some pre-existing hypertension was nevertheless in generally fair health as was his father, who suffered from a low back disability from an industrial injury.

5. Decedent who was 35 years of age at the time of his death had a life expectancy of 36.69 years according to the 1958 Commissioner's Standard Ordinary Life Tables, 18 Arizona Revised Statutes.

6. The life expectancy of the decedent's father at the time of the death of decedent was 16 years, and his mother's, 21 years.

7. The decedent had a work life expectancy of 27 years at the date of his death.

8. The decedent and his wife were married on November 30, 1976, after a long courship in accordance with the customs of the Country of Mexico.

9. The decedent graduated from Bisbee High School, Bisbee, Arizona, on May 28, 1974.

10. The decedent's employment and earnings from 1971 to date of death were:

Date	Employer	Gross Income
1971	Phelps-Dodge Corp.	$ 7,523.00
1972	Phelps-Dodge Corp.	8,367.00
1973	Phelps-Dodge Corp.	8,654.00
1974	Phelps-Dodge Corp.	9,215.00
1975	Unemployed—full time student Cochise College	

1976	Cochise County Hospital and Heublein	4,077.00
1977	Heublein and Mike Simon Food	4,089.00
1978	Mike Simon Food and U.S. Department of Agriculture	5,131.00

11. At the time of his death, decedent was working on a six month contract with the United States Department of Agriculture in connection with the screwworm eradication program which paid him approximately $1,400 a month. He had received offers of employment, which he declined, for work in a mine at Grant, New Mexico at $9 an hour, and the Douglas Smelter at $8 an hour.

12. The decedent at the time of his death had an earning capacity of $9,000 per year.

13. At the time of decedent's death, 45% of his gross income was used for his own support, including clothes, food, lodging, transportation and related expenses.

14. Decedent performed numerous household chores for his wife and assisted in shopping since she could not drive.

15. Decedent was a kind, loving person whose marriage to the plantiff, although short in duration, was of a caring nature and one the Court finds would have been of long duration.

16. Because the decedent's brother and sister had moved from Bisbee, Arizona, he was the only child available to assist his parents in chores around the house. This, he did willingly. It was particularly necessary for him to help his father who could not do anything of a heavy nature due to a disabling back injury.

17. The decedent's parents have suffered serious emotional distress and the wife has experienced an anxiety reaction as a result of the emotional trauma from his death.

18. The decedent's wife has suffered substantially from the traumatic loss of her husband. She, being a citizen of Mexico, was a stranger in a foreign country and relied greatly upon her husband to assist her in the day to day affairs of life, as well as assisting her in learning to speak the English language.

19. The decedent's wife, although licensed as a beauty operator in the Country of Mexico is not licensed in the State of Arizona. She is attempting to educate herself and get her American citizenship as well as obtain some form of teaching certificate. She is experiencing great difficulty in these endeavors because of the language barrier and the emotional problems resulting from the loss of her husband make it difficult for her to attend school.

20. The plaintiff wife is presently receiving a monthly pension of $419 from the United States government which she will receive for her lifetime, provided she does not remarry. The pension originally started at the amount of $356, advanced to $376 in 1979, to $396 in mid-1980, and as of December 1980, went to $419.

21. Decedent's wife incurred funeral expenses in the amount of $1,967.60.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties under the provisions of 28 U.S.C. S 1332.

2. The decedent had an earning capacity at the date of death of $9,000 per year, of which 45% was used to support himself. The resulting loss to the wife of $4,950 a year over the 27 year work life expectency of the decedent is $133,650.

3. The inflation rate and the discount rate applicable to the loss of income would offset each other and, therefore, the net loss of income to the wife is $133,650.

4. The wife is entitled to recover damages for the loss of love, companionship, comfort, guidance, anguish, sor-

row, stress and mental suffering and shock in the sum of $100,000.

5. The father and mother of the decedent are entitled to recover damages for the loss of companionship, anguish, sorrow, stress, mental suffering and shock in the amount of $40,000 to be divided based upon their life expectancy: $22,704 to the mother Celina Manje; and $17,296 to the father, Robert S. Manje, Sr.

6. Plaintiff is entitled to recover $1,967.60 for funeral expenses incurred.

7. The lien of the United States government, under the provisions of Title V, United States Code, Section 8132, shall be applicable only to those damages awarded to plaintiff under the provisions of Conclusion of Law No. 3.

ORDER

IT IS ORDERED that the Clerk enter JUDGMENT in favor of the plaintiff MA DEL CARMEN DBE MANJE, as the surviving spouse of the decedent Robert S. Manje, Jr., and against the defendant DEL RIO FLYING SERVICES, INC., a corporation, in the amount of $275,617.60, which amount shall be distributed by the plaintiff as follows:

1. To plaintiff Ma Del Carmen Manje, $235,617.60.

2. To Robert S. Manje, Sr., $17,296.00.

3. To Celina Manje, $22,704.00; together with plaintiffs' costs incurred herein.

The Clerk of the Court is directed to mail copies of these Findings of Fact. Conclusions of Law and Order to all counsel of record.

DATED: March 20, 1981.

Richard M. Bilby
United States District Judge

Office - Supreme Court, U.S.
FILED
SEP 8 [illegible]
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-232

DEL RIO FLYING SERVICES, INC.,
a corporation,

Petitioner,

versus

MA DEL CARMEN DBE MANJE, surviving
spouse of Robert S. Manje, Jr.,
deceased, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-232

DEL RIO FLYING SERVICES, INC., a corporation,

Petitioner,

versus

MA DEL CARMEN DBE MANJE, surviving spouse of Robert S. Manje, Jr., deceased, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUMMARY OF ARGUMENT

The Petitioner failed to present any argument in the trial court concerning a claim that there was a legal presumption of due care on the part of the deceased pilot. Accordingly, as this issue was first raised on appeal, the Court of Appeals correctly disregarded the argument.

The Court of Appeals correctly affirmed the trial court's entry of summary judgment in favor of the Respondents on the issue of liability upon the doctrine of res ipsa loquitur. The trial court correctly applied the doctrine according to Arizona law. The cases cited by the Petitioner are inapposite to Arizona law.

The Petition for Certiorari deals solely with the application of res ipsa loquitur under Arizona law and does not involve an important question of Federal law which should be decided by this court.

ARGUMENT

For the first time on appeal, the Petitioner submitted the issue of whether or not a presumption of due care on the part of the deceased pilot would overcome the inference of negligence which would arise through the application of the doctrine of res ipsa loquitur. This issue was not raised by the Petitioner in the trial court and indeed, it stipulated at the motion for summary

judgment that there was no issue of fact. Accordingly, pursuant to the law of the Ninth Circuit, the Court of Appeals was at liberty to disregard this newly raised issue. United States v. Kabinto, 456 F.2d 1087 (9th Cir.), cert. den., 409 U.S. 842 (1972).

As this case obtains federal jurisdiction through diversity, the applicable law is that of Arizona. Pursuant to Arizona law, the doctrine of res ipsa loquitur is available only where the plaintiff is not in a position to show the particular circumstances which caused the offending agency or instrumentality to operate to his injury. Jackson v. H. H. Robertson Company, Inc., 118 Ariz. 29, 574 P.2d 822 (1978). Upon the stipulation of both parties that there were no remaining facts to be considered, Respondents moved for a summary judgment on liability claiming that as it was undisputed that the crash of this airplane was caused neither by mechanical defects, weather problems nor any act of Respondent's decedent;

therefore, as a matter of law, the negligence of the pilot caused the crash. As there was no Arizona law specifically dealing with the application of res ipsa loquitur to airplane crashes, the trial court correctly reasoned that Arizona would adopt the law of California as found in Newing v. Cheatam, 540 P.2d 33 (Calif. 1975).

The cases cited by Petitioner are inapposite to this appeal. Sweeney v. Erving, 228 U.S. 233 (1913), was a malpractice case arising in the District of Columbia wherein the plaintiff attempted to use the doctrine of res ipsa loquitur after he was burned by an X-ray machine. The court held that evidence of the defendant doctor to the effect that it may not be possible to guard against burns even with the exercise of due care justified a judgment in favor of the defendant. Such is not the state of the facts in the instant case.

In like manner Commercial Molasses Corp.

v. New York Tank Barge Corp., 314 U.S. 104 (1941), an admiralty case, held that a doctrine such as res ipsa loquitur would not be applicable to the sinking of a barge where there was no evidence of unseaworthiness even after the barge was raised and examined.

Petitioner cites two airplane crash cases, Morrison v. LeTourneau, 138 F.2d 339 (5th Cir. 1943) and Chapman v. United States, 194 F.2d 974 (5th Cir. 1952), where res ipsa loquitur was not applied where it was also shown that the planes crashed in bad weather and with mechanical difficulties.

The Petitioner's reliance upon Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975), is also misplaced. In that case the Court of Appeals refused to apply res ipsa loquitur in an airplane crash. The facts recite that the trial judge, applying Oklahoma law, felt that res ipsa loquitur was not applicable against a defendant who repaired the aircraft. This holding was proper in that the aircraft repairer was not in exclusive control of the

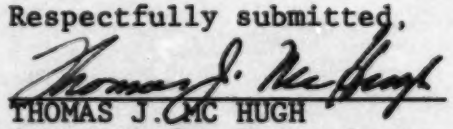
airplane when it crashed; therefore, there could be other reasons for the incident other than negligence of the defendant.

The cases relied upon by the Petitioner are interpretations of the law as applied by jurisdictions other than the State of Arizona. Moreover, Petitioner's authority rests upon facts which are inapposite to the instant case.

CONCLUSION

The Petition for Certiorari should be denied as this case deals solely with the application of Arizona law. On its facts it is not in conflict with any decision of this court nor any court of appeals. Moreover, as this petition does not involve important questions of Federal law, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Opposition to Petition for a Writ of Certiorari have been mailed to:

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